



File Code: 2350

Date: April 3, 2009

Wendy Wyels
Chief, Compliance and Enforcement Section
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200
Sacramento, CA 95670-6114

Dear Ms. Wyels:

This letter supplements the Forest Service's comment letter dated April 1, 2009, and addresses the Water Board's intent to include the Forest Service, along with El Dorado County, as a named party in its Cleanup and Abatement Order (CAO). It is the Forest Service's understanding that the Water Board is naming the Forest Service as a discharger based upon the United States' status as the feeholder of lands adjacent to the Rubicon Trail and lands underlying the Rubicon Trail. The Forest Service understands the Water Board's assertion to be that there is a discharge of pollutants occurring based upon off-trail activities, such as motor vehicle use and disposal of human waste.

The Rubicon Trail crosses both National Forest System (NFS) lands and private lands. We see no distinction between the Forest Service as a feeholder and the private owners as feeholders. Because the private owners are similarly situated and have the same control over off-trail activities as the Forest Service, we believe that if the Forest Service is a named party in the CAO, the owners of the private lands that are crossed by the Rubicon Trail should be named parties as well. Otherwise, the Forest Service is being treated differently than the private owners. If only the Forest Service, and not the private landowners, are named in the CAO, then the United States' waiver of sovereign immunity in the Clean Water Act, 33 U.S.C. §1323(a) may not be applicable with respect to this CAO.

Additionally, the time frames within the CAO are unrealistic to the extent that it requires the completion of projects. Any projects, such as decommissioning, construction of trail drainage structures, or bridges, may require the agency's compliance with either the National Environmental Policy Act (NEPA) or the California Environmental Quality Act (CEQA) which, depending upon the project, could take years. Relatedly, the Eldorado National Forest Transportation Plan did not address the resource needs and management direction for the Rubicon Trail due to the County asserting legal ownership of the road citing RS2477 claims, as a result, the Eldorado National Forest Land and Resources Management Plan does not provide direction for managing the trail. Therefore, the draft CAO needs to identify an objective basis for inclusion of the Forest Service in any CAO.

Some of the draft CAO directives are unrealistic, not legally possible under Forest Service regulations or fail to recognize that enforcement mechanisms are already in place. For example, the draft CAO 3(l) directs the establishment of "operating procedures to enforce the use of spill



kits for containment of liquid and solid wastes generated from vehicle use on the Rubicon Trail.” The Forest Service currently has regulations prohibiting leaving refuse, debris, litter in an exposed or unsanitary condition. 36 C.F.R. §261.11(b). To require anything more specific would require an amendment to Forest Service regulations, a long and lengthy process. Rather than focusing on prohibitions or enforcement of the activities of the public users, the CAO should focus on affirmative actions for on-the-ground projects that are within the scope of the agency’s authorities.

We look forward to discussing the draft CAO with the Water Board later this month, including ongoing actions to address resource impacts in a collaborative manner and opportunities to clarify the relative responsibilities of the public and private parties with interests in and responsibilities involving the Rubicon Trail.

Sincerely,

JEFFREY VAIL
Acting Forest Supervisor

cc: Ed Knapp